James Julian Inc. of Delaware *and* Larry W. Davis. Case 4–CA–24973

July 15, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND BRAME

On January 22, 1998, Administrative Law Judge James L. Rose issued the attached Decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2] The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to retain Charging Party Larry Davis in April 1996, when it began operating as a nonunion company. In its exceptions, the Respondent contends, inter alia, that the judge's finding that it harbored animus against Davis is not supported by substantial evidence. In finding no merit in this contention, we rely on the reasons stated in the judge's decision and the additional observations set forth below.

First, the Supreme Court has held that it is a violation of Section 8(a)(3) of the Act for an employer to discipline union officials more severely than other employees who participated in an unprotected work stoppage. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). Here, the record shows that Davis, an active union steward, was treated in just such a disparate manner. In July 1995 Davis and other truck drivers took a 10-minute break to which they believed they were entitled under the collective-bargaining agreement. Foreman Joseph Ziegler, however, termed the employees' action a wildcat strike and, as a result, Davis was terminated.[3] The Respondent concedes in its brief that ''[o]ther employees took the break but were not disciplined.'' Therefore, even if the work stoppage was not authorized by the collective-bargaining agreement, under the principles of *Metropolitan Edison* the Respondent's officials still could not discriminate against Davis based on his status as union steward. By singling Davis out for discharge, the Respondent's management clearly displayed their hostility toward him because of his protected activity of holding union office.[4]

Second, the judge found that Project Manager James Hoban told Davis that one of the reasons why he was not rehired was his ''attitude.'' The Board has repeatedly found, with court approval, that, in a labor-relations context, company complaints about a ''bad attitude'' are often euphemisms for prounion sentiments. E.g., *Promenade Garage Corp.*, 314 NLRB 172, 180 (1994); *Helena Laboratories Corp.*, 225 NLRB 257, 269 (1976), enf. in pertinent part 557 F.2d 1183 (5th Cir. 1977); *L.S. Ayres & Co.*, 221 NLRB 1344, 1345 (1976), enfd. 94 LRRM 3210 (4th Cir. 1977). There is every reason to make that assessment where, as here, there is no credited evidence of an alternative explanation of Davis' ''attitude'' problem. Accordingly, we conclude that the Respondent's reference to Davis' ''attitude'' is further evidence that it was negatively disposed toward him and refused to retain him because of his union activities.[5]

ORDER

The National Labor Relations Board orders that the Respondent, James Julian Inc. of Delaware, Wilming-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We modify the recommended Order to comply with the Board's decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), as modified by *Excel Container*, 325 NLRB No. 14 (Nov. 7, 1997).

[3] Davis testified that he did not lead or call for the work stoppage, and the Respondent does not contend otherwise.

[4] We correct several factual errors in the judge's decision concerning Davis which do not affect the result in this case. First, the record is unclear how long Davis served as steward, and we therefore do not adopt the judge's finding that Davis' tenure as steward lasted 4 and 1/2 years. Second, we do not rely on the judge's suggestion that Davis filed an ''excessive'' number of grievances. Third, Davis did not file a formal grievance over his discharge (as the judge suggested), but he did involve the Union in the dispute and was reinstated. Fourth, Davis resigned as steward, but, contrary to the judge's finding, his resignation was not part of the reinstatement agreement.

[5] Member Brame does not join his colleagues in finding that the use of the term ''bad attitude'' generally is a euphemism for prounion sentiments. In so doing, he notes that, in this case, the Respondent's use of the term ''bad attitude'' was one of three components that comprised its written driver qualifications list which it allegedly used in considering the drivers for rehire. Nonetheless, he agrees with the judge's rejection of the significance of the list. The judge noted that the Respondent had offered no objective evidence that the Charging Party was other than a competent driver; that the author of the list did not testify; and that there were no objective facts in the record upon which the purported evaluation might reasonably be based. In such circumstances, Member Brame is in further agreement with the judge that the only evidence of an attitude problem was Davis' activity as a steward and his participation in taking a break in July 1995 for which he, and only he, was disciplined. Member Brame therefore agrees with his colleagues and the judge that the General Counsel made out a prima facie case of discrimination against Davis, and that the Respondent did not sustain its *Wright Line*, 251 NLRB 1083 (1981), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) burden of showing that it would have taken the same action against Davis even in the absence of his union activities.

ton, Delaware, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire or otherwise discriminating against employees because they engage in union or other concerted activity protected by the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Larry Davis full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Larry Davis whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire, and within 3 days thereafter notify Larry Davis in writing that this has been done and that the refusal to hire him will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Wilmington, Delaware facility copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since April 14, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to hire or otherwise discriminate against employees because they engage in union or other concerted activity protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Larry Davis full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Larry Davis whole for any loss of earnings and other benefits resulting from our refusal to hire him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire Larry Davis, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the refusal to hire him will not be used against him in any way.

JAMES JULIAN INC. OF DELAWARE

Donna D. Brown, Esq., for the General Counsel.
Frank S. Astroth, Esq., of Baltimore, Maryland, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Philadelphia, Pennsylvania, on November 17, 1997, upon the General Counsel's complaint which alleged that the Respondent failed to recall its employee Larry W. Davis in violation of Section 8(a)(3) of the National Labor Relations Act. The Respondent generally denied that it committed any violations of the Act.

Upon the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following findings of fact, conclusions of law, and recommended order.

I. JURISDICTION

The Respondent is a Delaware corporation engaged in the business of heavy and highway construction from an office in Wilmington, Delaware. In the course and conduct of this business, the Respondent annually purchases and receives materials valued in excess of $50,000 directly from points outside the State of Delaware. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), 2(6), and 2(7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that United Steelworkers of America, AFL–CIO–CLC (the Union) and its Local 15024 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

James Julian, Inc. (JJI) was a large heavy and highway construction company which for some years had a collective-bargaining agreement with the Union. In 1994 or 1995, the majority stockholder of JJI, James Julian, decided to retire. This decision led to the formation of the Respondent in early 1995 by his son, Joseph Julian, which in effect became the successor to JJI. The Union and the Respondent agreed to apply the collective-bargaining agreement to the Respondent's operations until a successor agreement could be negotiated. JJI completed its jobs and the Respondent and JJI bid three jobs as joint venturers.

In February 1996, the Union and the Respondent completed negotiations for a collective-bargaining agreement, which was submitted to the Union's International office for approval. At this time the Union determined that the Respondent was a new company, and pursuant to some kind of agreement with the building trades, the Union disclaimed interest in continuing to represent the employees. Thus by letter of April 12, 1996, Joseph Julian so advised all employees, and stated that the company would begin operating nonunion but he would be pleased if they would continue their employment.

Larry Davis worked for 7 years as a truckdriver for JJI, and for 4 and 1/2 years, until July 1995, was the shop steward. During his tenure, he performed the usual functions of a steward, including filing 21 grievances from April 25, 1994 to May 1, 1995, on behalf of himself and other employees and taking pictures of supervisors operating equipment.

On July 5, 1995, Davis, along with other truckdrivers, determined to take a 10-minute break to which they believed they were entitled under the collective-bargaining agreement. This led to a dispute between them and Foreman Joseph Ziegler, who called their action a wildcat strike. As a result, Davis was terminated, since, according to the notice signed by Ziegler, he had two written warnings on June 2, 1995.

Davis grieved the discharge and was reinstated, but as part of the reinstatement agreement, according to his undenied testimony, he resigned as the shop steward. He was replaced by William King.

Davis continued to work for JJI and the Respondent throughout 1995 and into April 1996; however, when the Respondent became nonunion, Davis was not hired. James Hoban, the Respondent's project manager (and former human resources director for JJI), testified that Davis was not hired because he would not perform laborers work but ''(h)is direct performance as a truckdriver, it was not related. No.'' Subsequently, Hoban testified that in addition to wanting truckdrivers who also could do construction work, truck coordinator Jack Allen evaluated dump truck drivers, ranking Davis next to last which was taken ''into consideration'' when the Respondent decided not to hire him.

B. *Analysis and Concluding Findings*

The General Counsel alleges that Davis was not hired by the Respondent because of his activity as the shop steward for JJI and/or his participation in the protected activity of taking a contractually permitted break while working for JJI.

The Respondent argues that Davis was not hired because of his low evaluation and because he would not do laborers work. The Respondent further argues that since its business is much smaller than that of JJI, it needed fewer dump truck drivers. Finally, the Respondent contends that there is no evidence of animus toward the Union and therefore no finding of discrimination can be made.

Davis was an aggressive steward who, during a 1-year period, filed 21 grievances. While the Respondent seems to argue such was not an excessive number, no objective evidence was offered to support this claim. In addition, Davis was clearly perceived as having caused what Ziegler called a wildcat strike. Of all the employees participating in taking the break, only Davis was disciplined in any way. He was discharged, but was subsequently reinstated. According to Davis' unrefuted testimony, as part of the reinstatement agreement between the parties, he resigned as the steward.

It is therefore clear that the management of JJI, who held the same or similar positions with the Respondent, harbored animus against Davis for his protected, concerted, and union activity. Such was put into words by Area Superintendent Jacob Baliff and truck coordinator Jack Allen, both of whom referred to Davis as a ''troublemaker.'' The implication that management took a negative view of Davis' work as the steward is not diminished by the general testimony that Baliff also called others troublemakers. This general testimony is devoid of detail concerning the circumstances under which Baliff may have made such a reference.

McDonald, who was the other driver not rehired, testified that he went to Zeigler's home to find out why and was told by Zeigler that he and Davis had been ''blackballed.''

Zeigler recalled the meeting but testified that he did not remember what was said. Therefore, I credit McDonald's testimony and find it additional evidence that the Respondent harbored animus against Davis.

Finally, Davis testified without contradiction that when he called Hoban to find out why he was not being rehired, Hoban told him ''(o)ne was my attitude, and the other was my job performance.'' The only evidence of an attitude problem was Davis' activity as the steward and his participation in taking a break on July 5, for which he was discharged notwithstanding that it appears to have been protected, concerted, activity.

I therefore conclude that the General Counsel proved a prima facie case of discrimination against Davis based on his previous union and protected activity. Thus the burden shifted to the Respondent to prove that Davis would not have been hired even without his having engaged in such activity. *Wright Line* 251 NLRB 1083 (1980) enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

When called by counsel for the General Counsel, Hoban testified that Davis was not recalled because he would not perform laborers work, and his work as a driver was not ''related.'' However, when called by counsel for the Respondent, Hoban testified that the low evaluation of Davis as a driver was also considered. Shifting reasons and the fact that some retained drivers also would not, for various reasons, perform laborers work, tend to discredit Hoban's testimony.

Finally, the Respondent offered no objective evidence that Davis was other than a competent driver. Allen did not testify, and there are no objective facts in the record upon which his purported evaluation might reasonably be based.

I discredit Hoban and I conclude that the Respondent failed to offer sufficient evidence to persuade that Davis was not retained because he was a poor employee and would not have been retained even had he not been the steward. Accordingly, I conclude that the Respondent violated Section 8(a)(3) by refusing to retain Davis.

REMEDY

Having concluded that the Respondent committed certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including reinstating Larry W. Davis to his former job, or if that job no longer exists, to a substantially identical position of employment and make him whole for any loss of wages or other benefits he may have suffered in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]